with regard to the deprivation of citizenship of the applicant. I think clause (3) of article 27 which says "... and the Federal Government shall have regard to the report in determining whether to make the order" is inserted in recognition that citizenship is a valuable right and asset and before a citizen is deprived of that, he should be given every opportunity to make his representation or to be heard before making an order of deprivation.

This, however, is an application to set aside the banishment order on the ground that under section 5(1) a banishment order can only be made in respect of any person not being a citizen of the Federation. I am satisfied from *Gazette* Notification No. 2728 dated 20th June, 1968 that the applicant has ceased to be a citizen by reason of the order of deprivation made on 3rd June, 1968 and accordingly he cannot avail himself of section 5. Whatever complaints he may wish to present with regard either to the manner or the circumstances under which the order of deprivation was made against him or as to its propriety, cannot be entertained by me in this application. Even if he wishes to make an attempt to challenge the order of deprivation, he would find himself barred from so doing by section 2 of Part III of the Second Schedule of the Constitution headed "Supplementary Provisions relating to Citizenship" which says, "A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court." I accordingly dismiss the application. There will be no order as to costs.

Application dismissed.

Solicitors: *Goh Eng Kee & Co.*

NAGAPUSHANI v. NESARATNAM & ANOR.

[O.C.J. (Raja Azlan Shah J.) April 26, 1969]

[Kuala Lumpur — Civil Suit No. 250 of 1964]

Family Law — Husband and Wife — Title to property — Presumption of advancement — Gift of sums deposited into wife's savings account — Part of purchase price of property paid by wife — Amount unascertained — Property shared equally by both spouses.

Hindu Law — Marriage by Hindu rites — Evidence — Cohabitation and reputation of husband and wife — Presumption.

Equity — Dispute between husband and wife — Equity leans towards equality — "Palm tree" justice.

The first defendant was the registered owner of a piece of land and house (hereinafter called "the property"). In 1959, he executed an assignment of his rights in respect of the property in favour of the plaintiff. The property was reassigned by the plaintiff to him in 1961. Finally in 1962, the first defendant assigned it in favour of his mother, the second defendant.

The plaintiff claimed that the aforesaid assignments executed in 1961 and 1962 were void on the grounds of coercion and fraud. Evidence was tendered on her behalf to prove that she was the wife of the first defendant. Of the purchase price of $17,500 for the said property, $5,600 had been paid by monies drawn from the plaintiff's Post Office Savings Account. The savings account had been opened by the first defendant in the name of the plaintiff with an initial deposit of $250. Thereafter the first defendant deposited various sums from time to time. The plaintiff also deposited the savings from the household allowances given to her by the first defendant into the account.

The plaintiff brought an action against the defendants for a declaration that she was the beneficial owner of the said property and for the payment to her of the rents collected from the tenants of the house, less the amount expended for payment of quit rent and assessment rates.

Held: (1) the plaintiff had sufficiently proved that she was the wife of the first defendant. There was no evidence to support the allegations of coercion and fraud and the assignments were therefore valid;

(2) where a husband transfers property to the name of his wife there is a presumption of an intention to effect a gift to her. In this case, the presumption of gift was rebutted by the plaintiff's re-assignment of the property to the first defendant in 1961;

(3) there was a presumption of a gift to the plaintiff of the monies deposited by the first defendant into the plaintiff's savings account. The savings from household allowances however, belonged to the first defendant. As it was not possible to ascertain the exact portion contributed by each spouse, the rule that equity leaned towards equality applied and both spouses have equal shares in the property;

(4) the absence of an intention between the parties to create legal relations did not affect the plaintiff's claim as it did not depend upon the existence of a legally enforceable contract between her and the first defendant but was founded upon the rights and privileges which flowed from the special relationship between husband and wife;

(5) the effect of the plaintiff's assignment of her rights in the property in favour of the first defendant was that the latter was deemed to hold her interest on trust for her. The first defendant was therefore liable to account to the plaintiff for one half of the rents collected by him less the payment for quit rent and assessment rates.

Cases referred to:-

(1) *Spivack* v. *Spivack* (1930) 142 L.T. 492.
(2) *Paramesuari* v. *Ayadurai* [1959] M.L.J. 195.
(3) *Silver* v. *Silver* [1958] 1 All E.R. 523.
(4) *Mews* v. *Mews* (1852) 15 Beav. 529.
(5) *Blackwell* v. *Blackwell* [1943] 2 All E.R. 579.
(6) *Re Rogers' Question* [1948] 1 All E.R. 328.
(7) *Rimmer* v. *Rimmer* [1952] 2 All E.R. 863.
(8) *Cobb* v. *Cobb* [1955] 2 All E.R. 696.
(9) *Mercier* v. *Mercier* [1903] 2 Ch. 98.
(10) *Spellman* v. *Spellman* [1961] 1 W.L.R. 921.
(11) *Balfour* v. *Balfour* [1919] 2 K.B. 571.

CIVIL SUIT.

A. Mahendra for the plaintiff.

R. R. Chelliah for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This action is brought by Nagapushani d/o Chelliah against Nesaratnam s/o Rasiah (first defendant) and Thangammah d/o Velupillai (second defendant). The plaintiff claimed to be the wife of the first defendant and the daughter-in-law of the second defendant who was the mother of the first defendant. She claimed that on 30th April 1942 at Sungei Buloh, she went through a ceremony of marriage with the first defendant according to Hindu rites. The defendants denied this. In June or July 1957 the first defendant negotiated with one Ng Choo Kiat Company, Petaling Jaya for the purchase of two pieces of land on which houses were to be built. The pieces of

land are along Road 3A (formerly Road 18A) Petaling Jaya and the negotiated price for each house was $17,500. The said land was held under Approved Applications. The house and land in Lot 3 Road 3A, Petaling Jaya is now the subject-matter of this action. On 15th September 1958 the said land was assigned to and registered in the name of the first defendant. On 4th March 1959 the first defendant assigned his rights in favour of the plaintiff. On 27th December 1961, the plaintiff assigned her rights in favour of the first defendant. Finally, on 19th February, 1962, the first defendant assigned his rights in favour of the second defendant. When the house was completed by 1959 it was rented out. The plaintiff used to collect the monthly rents until February 1962 when the first defendant began to collect the rents himself.

The plaintiff prayed for: (1) A declaration that the assignment of rights in respect of Lot 3 Road 3A, Petaling Jaya, executed by her in favour of the first defendant and the subsequent assignment by the first defendant in favour of the second defendant were void. (2) A declaration that she was the beneficial owner of the said land. (3) An order directing the proper registering authority to register the plaintiff's name as the approved applicant for the said land. (4) An order that the first and second defendants should pay to her the amount of rents collected by them from the tenants of the said house from February 1962 to the date of judgment less the amount expended by them for payment of quit rent and assessment. (5) Such other order or reliefs as the court may deem fit and proper.

Counsel for the defendants contended that it was immaterial whether the plaintiff was married to the first defendant. With respect, I am unable to agree with that. The existence of a marriage, if any, between the plaintiff and the first defendant must surely go to the root of the dispute since rights and liabilities would have been created by the coverture.

The plaintiff said that she married the first defendant on 30th April 1942 at Sungei Buloh according to Hindu rites. She came to Malaya in 1941 from Ceylon with her sister, Nagaratnam d/o Chelliah, at the invitation of the father of the first defendant who wanted to arrange a marriage between her and the first defendant. She was then 17 years old. A copy of the invitation card was produced. The names of the sponsors of the wedding were stated in the invitation card to be V. Kulathungam, T. Thambirasa, and K. Arunachalam — all three since deceased. Friends and relatives were invited. The plaintiff said that she was given away by Kulathungam and his wife. Yalliani d/o Kunagaratnam (P.W.4), the wife of the late Kulathungam, testified that she and her husband had given the plaintiff away at the wedding. The priest who performed the ceremony could not be located but the plaintiff described the ceremony with some detail. She produced a *"tali"* (a golden chain) which she claimed the first defendant tied around her neck during the wedding ceremony as a symbol of marriage. Maniam s/o Kuthiappan (P.W.2), a goldsmith, recognised the *tali* produced in court as the one which he had made for the father of the first defendant during the Japanese Occupation in 1942, that is, the year of the alleged wedding. She called witnesses who attended the wedding. Veeriah s/o Venkatachalam (P.W.3) testified that he was consulted by the father of the first defendant to choose an auspicious date for the wedding and that he attended the wedding. K. Arul Ayah (P.W.5) the brother of P.W.4, testified that he and his wife were at the wedding ceremony. Logambal d/o Ponnusamy (P.W.6) also testified that she attended the wedding ceremony. The plaintiff said that she and the first defendant cohabited at various places in Selangor from 1942 until 1960 when the first defendant left for Johore Bahru. The first defendant agreed that he and the plaintiff had lived under the same roof. When they were living together, they went to film shows, attended dinners and visited relatives together. The plaintiff produced a photograph showing her and the first defendant taken about a year after the wedding. P.W.5 testified that on some occasions plaintiff and the first defendant had paid him social calls. The plaintiff and the first defendant had also visited P.W.6. P.W.5 and P.W.6 also testified that from about three or four years after the marriage, the first defendant began an affair with plaintiff's sister.

The first defendant denied that he had undergone a ceremony of marriage with plaintiff. He said that his father wanted him to marry the plaintiff but he refused. Undaunted, his father had carried on with the preparations for the marriage, fixed a date and issued invitation cards. To avoid the marriage he said that he left for Alor Star after which his father called off the marriage. The first defendant further said that on 20th January 1944 he married the plaintiff's sister according to Hindu rites which marriage was registered on 28th March 1962 at the Civil Registry, Kuala Lumpur. The second defendant and the plaintiff's sister gave evidence to similar effect.

In view of the evidence before me, I am satisfied that the plaintiff and the first defendant went through a ceremony of marriage in 1942 according to Hindu rites, cohabited for a number of years and enjoyed the reputation of husband and wife. In any event, in the circumstances obtaining in this case, the court can properly apply the presumption of marriage in the plaintiff's favour which has not been rebutted by clear evidence (see *Spivack* v. *Spivack*[1]).

Marriage by Hindu rites is common in this country and is commonly regarded as binding on the parties. It will be startling to hold otherwise in view of the prevalent practice. Such a marriage was recognised in *Paramasuari* v. *Ayadurai* [2] where the parties went through a ceremony of marriage according to Hindu custom.

On 19th March 1951 the first defendant opened an account in the Post Office Savings Bank in the name of the plaintiff with an initial deposit of $250. Thereafter, he deposited various sums from time to time in her name. The plaintiff also deposited the savings from the household allowances given her by the first defendant. By 1957, the total deposits had amounted to $5,652.94 (plus the interest for that year). On 11th July 1957, the plaintiff withdrew the sum of $5,600 and handed it to the first defendant who used it for

part payment towards the purchase price of the land in Lot 3 Road 3A, Petaling Jaya. The first defendant stated in evidence: "House No. 3 cost $17,500. Out of this, $5,600 came from plaintiff's account." From time to time the first defendant paid various sums as instalments. All the payments were made in the name of the first defendant. The final payment was made on 15th September 1958.

Plaintiff first claimed that the assignment of rights in favour of the first defendant made on 27th December 1961 was void on ground of coercion. There was no evidence in support of that. In my view, the assignment of rights was properly executed on 27th December 1961 in favour of the first defendant. The allegation of fraud in respect of the assignment to the second defendant on 19th February 1962 was also not proved.

Counsel for the plaintiff argued that a gift of the house ought to be presumed in the plaintiff's favour. He relied on a passage from *Halsbury's* Laws of England, 3rd edition, Vol.19 p.832:

"Where a husband purchases property or makes an interest in the name of his wife, a gift to her is presumed in the absence of an intention to the contrary..."

But the presumption is more easily rebutted now than it used to be. I need only refer to *Silver* v. *Silver*.[3] In that case, the husband and wife bought a house for £895 of which £90 was provided by the wife's parents and the rest was borrowed from a building society. Later this house was sold, another was bought for £2,000 of which £1,500 was borrowed from the building society. Subsequently, this house was sold and yet another house was bought for £4,950 of which £2,500 was borrowed from the building society. All the houses were conveyed into the name of the wife. In each mortgage, the husband joined as guarantor and the mortgage payments of principal and interest were paid out of a weekly allowance made by the husband to the wife. The Court of Appeal held that the wife was entitled to the house on the presumption of a gift by the husband. Lord Evershed said at p.525:

"There is a rule of equity which still subsists, even though in this day and age one may feel that the presumption is more easily capable of rebuttal — a rule that if a husband makes a payment for or puts property into the name of a wife, he intends to make an advancement to her. As was said by Sir George Jessel some time ago, such a disposition by the husband, unless otherwise explained, will be treated in equity as intended to effect a gift."

The presumption of a gift can be rebutted by the words and acts of either spouse either prior to, contemporaneous with or subsequent to the transfer of the property.

Applying that test, there is a presumption of gift of the house to the plaintiff by the first defendant who, on 4th March 1959, executed an assignment of rights in her favour. But this presumption of gift is rebutted by the act of the plaintiff in assigning the house back to the first defendant on 27th December 1961.

Counsel for the plaintiff next contended that the initial deposit and the subsequent sums which the first defendant had put into the account of the plaintiff in the Post Office Savings Bank were to be presumed as gifts to her. It is stated in *Halsbury's* Laws of England, 3rd edition Vol.19 p.833:

"A gift is also presumed where money is deposited at a bank in the name of the wife..."

This statement is based on an *obiter dictum* in an old English case of *Mews* v. *Mews*.[4] In that case a farmer's wife had deposited in her own name the money derived from the produce of the family firm and the husband had given directions to his executor to remove the money from the firm and to do the best he could with that for her. The court held that the evidence was insufficient to establish a gift to the wife. Sir John Romilly M.R. said (*obiter*):

"The evidence which is required to constitute a valid gift, as I have before stated, is that there must be some clear and distinct act by which the husband has divested himself of the property, and engaged to hold it as a trustee for the separate use of his wife ... if he had himself deposited the money with bankers, or with those gentlemen as quasi-bankers, stating that they were to hold it for his wife, that would probably have been sufficient for that purpose."

Applying that, there is a presumption of a gift to the plaintiff in respect of the money which the first defendant had deposited in the Post Office Savings Bank in the name of the plaintiff.

The plaintiff agreed that part of the savings in the Post Office Savings Bank was derived from money saved from the household allowances provided by the first defendant. It is not known what part of the savings was so derived. In *Blackwell* v. *Blackwell*[5] it is established that savings from household expenses belong to the husband. In that case, the husband and wife separated and there was a sum of money standing to the credit of the wife in a co-operative society which represented money saved from the housekeeping allowances given to the wife; the Court of Appeal held that the sum belonged to the husband. In the present case, that part of the money deposited in the plaintiff's savings account which was derived from the savings from housekeeping allowances belonged to the first defendant. Therefore, a part of the total deposit of $5,652.94 in the plaintiff's account in 1957 belonged to the first defendant, but it is not possible to ascertain the exact portion that was first defendant's.

To sum up, the first defendant used the sum of $5,600 as part payment for the purchase of this house. This sum was drawn from the plaintiff's savings account, the deposits in which belonged in part to her and in part to the first defendant. The rest of the purchase money was paid by the first defendant in various instalments.

When both spouses contributed to the purchase of a house, they must be presumed to have intended to take some interest. The question arises as to the size of interest each is to take. If the spouses had contributed in fixed and definite amounts, their respective interests should be in the same proportion as their contributions. In *Re Roger's Question*[6] where the spouses bought a house for £1,000 out of which the wife contributed £100, the husband borrowed the rest on a mortgage and the wife made it clear £100 was all she was prepared to contribute, the Court of Appeal held that the husband should hold the house on trust for sale and the proceeds should be divided

in the ratio of nine for the husband and one for the wife. But where it is not possible to make such a clear division, it will be equitable to hold that the spouses are entitled equally. In *Rimmer* v. *Rimmer*[7] the spouses bought a house for £460 in the name of the husband. The wife provided the deposit of £29 and the rest of the money was borrowed on the security of a mortgage from a building society in the name of the husband. £151 of the principal of the mortgage money was repaid out of housekeeping money provided by the husband, and the remaining £280 was repaid by the wife out of her own money. The Court of Appeal held that it was not possible to assess the separate beneficial interest of the husband and the wife by reference to the contributions which they had made towards the purchase of the house and that the beneficial interest should be divided equally between them. Romer L.J. said at p.870:

"Cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes the purchase price of property, and ... the old-established doctrine that equity leaned towards equality is peculiarly applicable to disputes of the character of that before us where the facts, as a whole, permit of its application."

(See also *Cobb* v. *Cobb*[8]). This is sometimes referred to as "palm tree" justice.

The present case is an apt occasion to apply the "palm tree' justice. Both the plaintiff and the first defendant contributed towards the purchase of the house though the exact contribution of the plaintiff cannot be ascertained. It will be equitable that they have equal shares in the house (and land on which the house stands). *Re Rogers' Question, supra,* is distinguished on two grounds. First, the contribution of each spouse in that case could be ascertained with certainty which is not possible in the present case. Secondly, the wife in *Re Rogers' Question* had stipulated that her contribution of £100 was all that she would be prepared to pay while in the present case the wife seemed prepared to make further contributions. Indeed, on 10th January 1962 she withdrew $2,000 from her savings account and gave this sum to the first defendant, *inter alia,* for payment of assessment rates for the house.

When the plaintiff assigned the house to the first defendant on 27th December 1961, the latter is deemed to hold her interest on trust for her and he is liable to account for whatever rents to which she is entitled, that is, one half of the rents collected from February 1962 to the date of judgment less the payments for quit rent and assessment rates. It is concisely stated in *Halsbury's* Laws of England, 3rd ed. Vol. 19 p.834:

"No presumption of a gift from a wife to husband arises from the transfer into his name, or into their joint names. of shares or stock belonging to her; or from a purchase of property with her money, on an investment of her money, in his name or in their joint names. In all such cases, the husband is presumed to be a trustee for the wife in the absence of a contrary intention." (See *Mercier* v. *Mercier*[9]).

Finally, counsel for the defendants contended that as between the plaintiff and the first defendant there was no intention to enter into a legal relationship in respect of the purchase of the house. Counsel referred to *Spellman* v. *Spellman.*[10] In that case, it was agreed between the spouses that a car should be bought for the wife. When the wife saw a car which was delivered to the house she asked the husband whether that was the car which he had "bought" for her. He replied that it was. When the spouses separated both spouses claimed the car. The car was in fact bought under a hire-purchase agreement. The Court of Appeal held that the husband had no power to give the car to the wife while the hire-purchase agreement was subsisting. The court also held that the agreement was purely a domestic arrangement not intended to create legal relationship and was, therefore, not enforceable by the court. Danckwerts L.J. said at p.926:

"It seems to me that the proper conclusion on all the evidence in the present case is that there was not any intention to create legal relations, but merely an informal dealing with the matter between the husband and wife, which is common in daily life, and which does not result in some legal transaction but is merely a matter of convenience."

Therefore, the husband was entitled to the car. In *Balfour* v. *Balfour*[11] the wife sued the husband for money which was due under a verbal agreement whereby he was to give her a monthly sum in consideration of her agreeing to support herself without calling upon him for any further maintenance. The Court of Appeal held that the agreement was only a domestic arrangement which could not be enforced as the parties did not intend that the arrangement be attended by legal consequences. It must be observed that in both the cases, what the plaintiff spouse sought to do was to enforce the promise of the other spouse. In *Spellman* v. *Spellman* it was the promise of a car which was sought to be enforced, and in *Balfour* v. *Balfour* the promise of a monthly sum of money. But in the present case, the court is not called upon to enforce any promise made by the husband. If that were so, the court would decline to act on the authority of *Spellman* v. *Spellman* and *Balfour* v. *Balfour*. This court is invited to adjudicate the interests of the parties in regard to a house which was bought by the monetary contributions of both the spouses. The plaintiff's claim does not depend on the existence of an enforceable contract between herself and the first defendant in respect of the purchase of the house. Her claim is founded on the rights and privileges which flow from the special relationship between husband and wife. Her claim is, to a great extent, buttressed by the presumptions of law in her favour. Where both spouses have contributed to the purchase of a home, each must have intended to take some benefit, and, it will be for the court to decide the respective interest of each.

Costs to be borne by each party. Order accordingly.

Order accordingly.

Solicitors: *Mahendra & Chee; R. R. Chelliah Bros.*